92-974

No.

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

Beverly Watkins
PETITIONER,

V.

THE UNITED STATES OF AMERICA,

ET AL
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Beverly Watkins
Appellant Pro-Se
3079 Bayview
Memphis, Tennessee, 38127

QUESTIONS PRESENTED FOR REVIEW

1.) Is exhaustion required if the federal administrative remedy is inadequate or unable to provide the relief requested?

2.) Is judicial review by the District Courts available when the administrative agency fails to follow regulations adopted by that agency ?

3.) Is an agency action considered final for the purpose of judicial review when it denies a right ?

4.) Regarding its representational functions does The National Association of Government Employees, (hereinafter NAGE) have the right to decide when an employee has exhausted all administrative remedies?

5.) Is it reasonable for a federal employee whom is not awareof all the federal administrative remedies available to him/her to rely on the Union's expertise regarding exhaustion?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FOR PETITIONER BEVERLY WATKINS

Petitioner Beverly Watkins (hereinafter "Ms. Watkins") hereby petitions this Court for a writ of certiorari to review the judgement

of the United States Court of Appeals for the Sixth Circuit affirming the grant of summary judgement by the United States District Court for the Western District of Tennessee, in favor of the United States, The Veterans Affairs, The Veterans Hospital of Memphis, Tennessee, Kenneth Mulholland, Hospital Director of the Veterans Hospital (hereinafter V.A. Hospital) Ben Jackson, Director of Labor Relations, V.A. Hospital, Tommy Davis, Chief Of Security, V.A. Hospital, Patricia Hyatt, Director, Respiratory Therapy, V.A. Hospital, and Arthur Nevels, Assistant Director of Respiratory Therapy, V.A. Hospital and also Carlo Mainardi, M.D., V.A. Hospital, on Ms. Watkins claims of deprivation of statutory entitlements granted by congress under the Civil Service Reform Act of 1978 and The Code of Federal Regulations, and constitutional violations.

The opinion of the Court of Appeals is reprinted begining at A-1 of the Appendix, infra.

JURISDICTION

The judgement of the Court of Appeals was entered on September 11, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.S. 1254 (1)

STATUTES INVOLVED

5 USCS 704

704 Actions Reviewable:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final action. Except as otherwise expressly required by statute, agency action otherwise final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for

any form of reconsideration, or unless the agency other wise requires by rule and provides that the action meanwhile is inoperative, for appeal to superior agency authority, (Sept. 6, 1966, P.L. 89-554, 1, 80 Stat. 392.)

5 USCA 706 Scope of Review:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(2) Hold unlawful and set aside agency actions, findings, and conclusions found to be-

(A) arbitray, capricious, an abuse of discretion or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(c) without observance of procedure required by law.

In making the foregoing determinations, the Court shall review the whole record or those parts of it cited by a party, due account shall be taken of the rule of prejudicial error. (Sept. 6, 1966, P.L. 89-554, 1, 80 Stat. 393.

STATEMENT OF CASE

Ms. Watkins, former employee at V.A. Hosp., and former Shop Steward for The National Association of Government Employees Local R5-66 (hereinafter NAGE.), was served a notice of proposed termination on November 20, 1990, dated November 20, 1990, for alleged writing and directing harrassing material towards Appellees Patricia Hyatt, and Arthur Nevels, **Wherein it was not proven that Watkins was actually the guilty party in the matter.**

CONSTITUTIONAL VIOLATIONS

The 5th Amendment of The United States Constitution of America:

No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES INVOLVED

5 C.F.R. 752.404

Procedures

(b) Notice Of Proposed Action. (1) The notice of proposal shall inform the employee of his

or her right to review the material which is relied on to support the reasons for action given in the notice. The agency may not use material which cannot be disclosed to the employee or his or her representative under 297.108 (c) part (1) of this title to support the reasons in the notice.

(c) Employees answer. (1) The agency shall give the employee a reasonable amount of official time to review the material relied on to support its proposal and to prepare an answer and to secure affidavits, if he or she is otherwise in active duty status. 5 C.F.R. 1201.115 (c)

The Board will only grant a petition for review if it is established that either new and material evidence is available that, despite due diligence, was not available when the record closed, or the decision of the judge is based on an erroneous interpretation of statute or regulation.

5 U.S.C. 7114 (b) 4

It is an unfair labor practice for an agency to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition or has given any information or testimony under the Statute.

5U.SC. 7116 (a)1

Management shall not interfere with, restrain, or coerce any employee in the exercise of rights under the Statute.

5 U.S.C. 7116 (a)5

It is an unfair labor practice to refuse to provide the labor organization, upon request, with available and necessary information which is required to fulfill its representational obligations;

5 U.S.C. 7116(a)8

It is an unfair labor practice to refuse to provide the exclusive representative the opportunity to be represented at a

Cont on page 10.

dress.

EVIDENCE OF PRETEXT

The Sixth Circuit Court of Appeals ruled that Ms. Watkins had failed to exhaust federal administrative remedies, and that the district court simply lacked jurisdiction to hear the case. The following is a summary of Ms. Watkins evidence of pretext.

Ms. Watkins was a Respiratory Therapy Technician, and an agressive Shop Steward for NAGE, whom filed numerous charges against V.A. Hospital for constantly engaging in prohibited unfair labor practices, grievances and Equal Employment Opportunity complaints, received a notice of proposed removal on November 20, 1990, for alleged writing and directing harrassing material to Appellees Hyatt and Nevels **which was not clearly proven.**

On November 23, 1990, Mr. James Confer, Jr. President of NAGE Local R5-66, served

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formal discussion within the meaning of the Statute.

5 U.S.C.A. 2301-02

Under Chapter 23, employees are to be treated fairly and equitably and "with proper regard for their privacy and constitutional rights."

5 U.S.C.A. 2301 (b)(2)

Section 2302 (b) (11) makes it a prohibited personnel practice to take any action that violates merit-system principles.

42 U.S.C. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to deprivation of any rights privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for re-

Mulholland with a request of the evidence the agency was using to support the reasons in the notice. This request was denied. Again on December 11, 1990, Mr. Confer submitted another request for the evidence the agency used to support the reasons in the notice, to Ms. Debra Thornhill, Labor Relations Specialist, in an effort to obtain this information, whereas Ms. Watkins and Mr. Confer would know how to respond to it. This request was also denied.Mr. Confer proceeded to file an unfair labor practice charge against the agency for its prohibited personnel practices, in this matter. On January 11, 1991, Mr. Mulholland proceeded to terminate Ms. Watkins, refusing to provide the evidence the agency used to support the reasons in the notice, and also refused to allow access to the information.

It was in this instance that Ms. Watkins

was deprived of her right to due process of law and her statutory entitlements granted by congress. Ms. Watkins was also deprived of her right to equal protection of the laws. Ms. Watkins provided the District Court and The Sixth Circuit with the following proof of her allegations:

(1.) A report from the Security Department at V.A. Hospital which indicates numerous incidents of harrassment against Appellees Nevels and Hyatt, which includes employees in the Respiratory Department other than Ms. Watkins, and which also includes a male white.

(2.) The Federal Labor Relations Authority's (hereinafter FLRA) complaint against the following agency officials for their engagement of pro-

hibited personnel practices against Ms. Watkins, in violation of 5 U.S.C. 7114 (b) 4, 7116 (a)1, (a)5 and (a)8, which states the following

5 U.S.C. 7114 (b)4

It is an unfair labor practice for an agency to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under the Statute.

5 U.S.C. 7116 (a)1

Management shall not interfere with restrain, or coerce any employee in the exercise of rights under the Statute.

5 U.S.C. 7116 (a)5

It is an unfair labor practice to refuse to provide the labor organization, upon request, with available and necessary information which is required to fulfill

its representational obligations;
5 U.S.C. 7116 (a)8

It is an unfair labor practice to refuse to provide the exclusive representative the opportunity to represented at a formal discussion within the meaning of the Statute. Kenneth Mulholland, Barbara Nabors, Debra Thornhill, D. J. Turner, and W. T. Davis were all named in the complaint against the agency.

The F.L.R.A. settled the dispute out from under NAGE concluding that a posting throughout V.A. Hospital on various bulletin boards was a sufficient penalty against the agency and its officials for their unlawful actions. This penalty did nothing to make Ms. Watkins whole for the deprivation of her rights.

Mr. Raymond Shultz, Assistant General Counsel for NAGE's Midwest Office informed Ms. Watkins that he would not

appeal FLRA's decision at the advice of its Regional Director, Ms. Brenda Robinson whom stated to him during a telephone conversation regarding the matter that it would not do any good to appeal her decision because it would take years to get a response to the appeal, and that even then the appeal would be denied.

The employees indicated on the security report, compiled during an investigation by V.A. Security, were not terminated from employment as was Ms. Watkins.

5 C.F.R. 752.404

Procedures

(b) Notice of Proposed Action. (1) The notice of proposal shall inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice. The agency may not use material which cannot be dis-

closed to the employee or his or her representative under 297.108 (c) part (1) of this title to support the reasons in the notice. (c) Employees answer. (1) The agency shall give the employee a reasonable amount of official time to review the material relied on to support its proposal and to prepare an answer and to secure affidavits, if he or she is otherwise in active duty status.

5 U.S.C.A. 2301-02

Under Chapter 23, employees are to be treated fairly and equitably and "with proper regard for their privacy and constitutional rights."

Section 2302 (b) (11) makes it a prohibited personnel practice to take any action that violates merit-system principles.

Ms. Watkins further contends that **even though she did exhaust it was not necessary in this case due to the fact that her rights protected under the 5th Amend-**

ment of the United States Constitution have been violated, the agency departed from its own regulations, and further could not provide the relief of $5 million dollars for compensatory and punitive damages, yet she exhausted any way.

The unfair labor practice complaint against the Appellees was yet another means of exhaustion which served no purpose as for making the Appellant whole for the deprivation of her statutory and constitutional rights. Resort to the FLRA was indeed futile, although this agency maintains the power to issue a cease and desist order against the V.A. Hospital and the officials involved in the prohibited personnel practices against Ms. Watkins they refused to do more than place postings through the hospital which was nothing more than a slap on their hands.

Albeit 5 U.S.C.A. 2301-02 addresses congress' stand against violation of the constitutional and statutory rights, there existed no adequate administrative remedy in Ms. Watkins case to rectify the damage done to her professional reputation nor to maintain her reinstatement in light of the Appellees serious violations.

5 U.S.C.A. 2302 (b) (11) makes it a prohibited personnel practice to take any action that violates merit-system principles. Ms. Watkins further resorted to The Merit Systems Protection Board, and was represented by Mr. Raymond Shultz, Assistant General Cousel for NAGE's Midwest Office, but The Merit Systems Protection Board (hereinafter MSPB) also does not address deprivation of an employees' statutory or constitutional rights. As an example supporting this contention, Jack Salyer

Administrative Judge whom conducted the MSPB hearing regarding Ms. Watkins' removal, stated on page 2 of his motion titled "ORDER RE APPELLANT'S MOTION FOR POSTPONEMENT OF HEARING", (dicta) "**I ALSO MUST POINT OUT AGAIN THAT THE STANDARD OF PROOF HERE IS ONLY PREPONDERANT EVIDENCE (i.e., 51% MORE LIKELY TRUE THAN NOT TRUE) not the higher criminal court burden of proof.**

To further support the Appellants' contention that the MSPB does not address nor maintain the expertise required to contend with the issue of making Ms. Watkins whole for the deprivation of her right to due process of law and equal protection of the laws, as another example, in a motion by Mr. Austin Moody, Attorney for V.A. Hospital, stated (dicta) on pages 3 and 4 of his motion dated March 3, 1991:

1. Whether the agency can prove, by a preponderance of the evidence, the charges as contained in the notice of appellant's removal?

2. Whether the penalty selected, removal, is reasonable and appropriate?

3. Whether there is a nexus between the sustained charges and efficiency of the service ?

Again, as Ms. Watkins has shown the 6th Circuit United States Court of Appeals and the District Court for The Western District of Tennessee, that the administrative remedy in this case was inadequate and could not provide the relief requested.

Mr. Raymond Shultz stated in a letter to Ms. Watkins dated June 10, 1991, regarding the unfavorable MSPB decision dated May 14, 1991, that pursuant to 5 C.F.R. 1201.115 (c), and after reviewing the decision in detail, there were not grounds to appeal this decision, because as he

stated (dicta) "We do not meet the requirements to file a petition for review on either of these grounds. Since we do not meet the criteria for filing a petion for review, this will exhaust all of the administrative remedies on the removal action. Therefore, I will be closing the file on your case. If you have any questions concerning this letter,please do not hesitate to give me a call."

The statements above further prove that exhaustion of administrative remedies in this case was again futile. Again the deprivation of Ms. Watkins statutory and constitutional rights were not addressed, because the agency does maintain the expertise to hear matters regarding violation of The United States Constitution of of America, which is a perfect example of the inadequacy of administrative remedies in this case.

V.A. Hospital has maintained a pattern of depriving aggressive union officials and representatives equal protection of the laws. Mr. James A. Confer, President of NAGE Local R5-66, was terminated in 1991 after over 25 (twenty-five) years of service at V.A. Hospital, in the Respiratory Therapy Depart-Ment, for an infraction which the records prove, had been committed by other employees, yet only he was removed from employment.

To reflect the damage further done to Ms. Watkins professional reputation, upon applying for a position in the Respiratory Departments at the surrounding hospitals, their applications ask questions regarding any termination of employment in work history. One must tell the truth on these applications or run the risk of being terminated after employment. One REspiratory Director openly inquired to Ms. Watkins

regarding her termination of employment from V.A. Hospital, as it had appeared that he had been aware of the situation, but as he stated " I just wanted to hear it from you."

Mr. Confer provided the District Court and the 6th Circuit with sworn affidavits to support the above statements.

Ms. Watkins has provided the District Court with proof of having exhausted remedies, which was a futile effort, and further provided proof that her constitutional right to due process and equal protection of the laws had been denied by the Appellees. Ms. Watkins also provided proof that her congressional statutory entitlements had been also deprived, that the Appellees motive for their actions was because she was involved in many complaints against the agency which resulted in administrative hearings and FLRA complaints which landed them in court.

Watkins further provided proof to the lower Courts that the Agency was unable to award her $5 million dollars in compensatory damages and punitive damages, as well as the inadequacy of administrative remedy in this case, and that the District Court was the only forum to adequately adress the issues in her case.

Holding of Sixth Circuit

Discovery was not had in this case. On June 7, 1991, the Appellees moved for summary judgement. On July 25, 1991, The District Court granted the Appellees motion, ruling that Ms. Watkins had failed to exhaust administrative remedies.

On appeal the Sixth Circuit affirmed the granting of summary judgement. It held that " Watkins failed to exhaust her

administrative remedies and filed suit in District Court. The District Court simply lacked jurisdiction to hear the case.

REASONS FOR GRANTING THE PETITION

THE DECISION BELOW CONFICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS ON AN IMPORTANT ISSUE AFFECTING ALL FEDERAL EMPLOYEES AND UNION OFFICIALS REGARDING EXHAUSTION OF FEDERAL ADMINISTRATIVE REMEDIES.

A. The Decision Below That A Federal Employee Must Exhaust Administrative remedies regardless of whether it Would Be Futile Or Not Before bringing A Claim Before The District Court.

In this case the Sixth Circuit has held that a federal employee must attempt to exhaust administrative remedies even though it may be futile before the District Court may jurisdiction in the matter.

The Sixth Circuit's holding in this case conflicts with the decisions of this Court, which are well settled regarding the matter

of exhaustion of federal remedies when the agency departs from statutory authority, and deprives an individual of equal protection of the laws and due process of law, in the following cases:

1. The Supreme Court has consistently ruled that if an administrative official clearly departs from regulations and statutes, the administrative action is subject to judicial review even though a jurisdictional withdrawal statute is otherwise applicable. **Leedom v Kyne 358 U.S. 184 79 Supreme Court 180 (1958). Breen v Selective Service Board 396 U.S. 460, 90 Supreme 661, Oestereich v Selective Service Bd. 393 U.S. 233, 89 Supreme Court 414, Accardi v Shaughnessy 347 U.S. 260 74 Supreme Court 499.**

A long line of Supreme Court cases recognizes the rule that a party need not exhaust administrative remedies before bringing a claim to

federal court when the agency remedy is inadequate or cannot provide the relief requested. When the prescribed remedy is plainly inadequate because either no remedy is available, the available remedy will not give relief commensurate with the claim, or the remedy would be so unreasonably delayed as to create a serious risk of irreparable injury. Walker v. Southern Railway 385 U.S.196, 87 Supreme Court 365, (1966), Frozen Food Express v. United States, 351 U.S. 40, 76 Supreme Court 569 1956, United States v Joseph A. Holpuch Co. 328 U.S. 234, 66 Supreme Court 1000, (1946) United States Alkali Export Assdociation v. United States, 325 U.S. 196, 65 Supreme Court 1120.

In Mckart v. United States Certiorari To The United States Court Of Appeals For The Sixth Circuit 395 U.S. 185, 200, 89 Supreme Court 1657 (1969), the Court held that a party need not ex-

haust administrative remedies before bringing a claim to federal Court when the administrative remedy is inadequate or cannot provide the relief requested.

The Supreme Court and the D.C. Circuit defined an order as final for the purposes of judicial review when it imposes an obligation, denies a right or fixes some legal relationship as a consumation of the administrative process. **Fidelity Television Inc. v. FCC 502 F2d. 443 (DC Circuit) quoting Chicago and Southern Airlines Waterman SS Corp 333 U.S. 103, 68 Supreme Court 431.**

In Public Utilities Commission v. United States 355 U.S. 534, 78 Supreme Court 446, the Supreme Court held that Federal Courts do not require exhaustion of remedies when to attempt such exhaustion would be obviously futile .

In **Gibson v. Berryhill 411 U.S. 564, 575, 93 Supreme Court 1689 , The Supreme Court held:** Under existing authority, exhaustion of adminis-

trative remedies is not required when the question of the adequacy of the administrative remedy is for all practical purposes identical with the merits (the plaintiff's) lawsuit.

In **International Brotherhood of Electrical Workers vs. Foust 442 U.S. 48, 99 Supreme Court at 2125.** The Supreme Court ruled that the Union has the right to make decisions regarding its representative functions.

In **Myers v Bethlehem Shipbuilding Corp 303 U.S. 41, 50-51, 58 Supreme Court 459,** The Supreme Court held the following:
It has long been established that a party will normally be denied judicial relief for injury until available administrative remedies have been exhausted. (Ms. Watkins has exhausted all available remedies , and NAGE informed Ms. Watkins on June 14, 1991, that its legal staff would not pursue her MSPB appeal any further, and that her file on the removal ac- had been closed. Ms. Watkins further provided

The Federal District Court and The United States Court of Appeals For The Sixth Circuit with proof to support this statement.

The net effect of Sixth Circuit would allow Federal Agency Officials to deviate from congressional authority if they so decide which would be highly prejudicial to federal employees whom have suffered an injury as a result of an Official's misconduct, and wherein said Official deprives the exclusive bargaining unit NAGE) its obligational right to appropriately , and adequately represent the injured employee to the fullest extent. Hence review of this case is warranted inasmuch as the Sixth Circuit is in direct conflict with the well settled decisions of this Court regarding the important issue of exhaustion of federal administrative remedies.

Its is a well settled Supreme Court decision that the Appellees actions are forbidden.

In **Davis v. Passman 442 U.S. on page 234 The Supreme Court held the following:**

The Fifth Amendment provides that "no person shall be deprived of life, liberty, or property, without due process of law." In numerous decisions, this Court " has held that the due process clause of the Fifth Amendment forbids the federal government to deny equal protection of the laws. E.g., **Hampton v Mow Sun Wong 426 U.S. 88, 100.** (On December 6, 1990, Appellee W. Tommy Davis, in the presence of Mr. Confer, Mr. Brent James, Former Assistant General Counsel for NAGE's Midwest Office, and Ms. Watkins, that he had erased all other employees off of video tape from concealed security cameras which had been installed in The Respiratory Therapy Department, except images of Ms. Watkins. The other employees were blatantly engaging in misconduct at the office doors of Appellees Hyatt and Nevels, yet they were protected against the jeopardy of employment termination, **whereas albeit Watkins obviously was not engaging in any misconduct, was**

was not afforded equal protection of the laws.

page 242 of Davis v. Passman the following:

At least in the absence of a "textually demonstrable constitutional commitment of an issue to a coordinate politcal department **Baker v. Carr, 369 U.S. 186, 217 (1962)** we presume that justicable constitutional rights are to be enforced through the Courts. And unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the Courts for the protection of their justicable constitutional rights."

" The very essence of civil liberty" wrote - Mr. Chief JUstice Marshall in Marbury v, Madison . 1 Cranch 137, 163 (1803), certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. Davis v. Passman

supra.

B. **The Decision Below That A Federal Employee Must Exhaust Administative remedies Albeit Said Remedies Are Inadequate, And Unable To Commensurate With The Relief In The Claim, And Which Further Allows Federal Agency Officials To Exceed Their Statory Authority, And Deprive A Federal Employee His Or Her Constitutional Rights is in Conflict with Other Circuits As Well.**

In the decision below the Sixth Circuit has held that even if an employee has evidence that he did exhaust administrative remedies and that such exhaustion was not required, still that employee is not entitled to a trial on the merits. The Sixth

Circuit as a matter of law will not therefore allow any inference of proven exhaustion to be made in a law suit against the federal government even though under oath.

Five Circuits are in direct conflict with the Sixth Circuits position, including a prior panel ruling in the Sixth Circuit. A plaintiff with identical proofs therefore often have different results depending upon if such evidence is presented in another Circuit Court.

In Sinai Hospital of Baltimore v. Horvitz, 621 F2d 1267 (4th Circuit) 1980, the Court Held: If an administrative official clearly departs from statutory authority, the administrative action is subject to judicial review even though a jurisdictional withdrawal statute is otherwise applicable.

In Graham v. Caston 568 F2d. 1092 (DC Circuit) 1978, The Court held the same ru-

ling as Sinai Hospital of Baltimore v. Horvitz supra.

In Patsy v. Florida International University 634 F2d. 900 (1981) 5th Circuit, the Court maintained the same ruling as Sinai Hospital and Graham v. Caston supra. In Patsy the Court also held that if the agency remedy is inadequate and cannot commensurate with the claim exhaustion is not required.

In Fuentes v. Roher 519 F2d 379 (2nd Circuit) the Court held the following: Courts do not require exhaustion when the question of adequacy of the administrative remedy is for all practical purposes co-extensive with the merits of the plaintiffs' claim, such as when, for example the plaintiff contends that the administrative system itself is unlwaful or unconstitutional in form or application.

In Whitner v. Davis 410 F2d. 24,28,

The Court held: Exhaustion is not required if plaintiff claims relief or compensation for a deprivation of civil rights which have already occurred.

In Kaschak v. Consolidated Rail Corp. 707 F2d. 902 at 912 (Sixth Circuit) 1982 The Court held that the union has the right to decide at which point it wishes to discontinue process of an employees claim.

In Goar vs. Civilletti 688 F2d. 27 (1982) (Sixth Circuit) The Court held: A long line of Supreme Court cases recognizes the rule that a party need not exhaust administrative remedies before bringing a claim to federal court, when the administrative remedy is inadequate or cannot provide the relief requested. (See Patsy v. Florida International University 634 F. 2d. 900, 903 (5th Circuit)

CONCLUSION

This case presents important questions regarding exhaustion of federal administra- remedies. These questions have been answered differently by the Federal District Court and The United States Court of Appeals For The Sixth Circuit in direct conflict with this Court and other Circuits. Therefore the petition for writ of certiorari should be granted.

Respectfully Submitted,

Beverly Watkins

Beverly J. Watkins
Appellant Pro-Se
3079 Bayview
Memphis, Tennessee 38127
(901) 357-8114

Dated December 3 1992

No. 91-5987

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Beverly Joyce Watkins
Plaintiff-Appellant,

September 11, 1992
LEONARD GREEN, Clerk

v.

THE VETERANS ADMINISTRATION MEDICAL CENTER, KENNETH MULHOLLAND; DR. Carlo MAINARDI; DEPARTMENT OF VETERANS AFFAIRS; TOMMY DAVIS; PATRICIA HYATT; BEN JACKSON; ARTHUR NEVELS

Defendants-Appellees

BEFORE: MERRITT, Chief Judge; KEITH and RYAN Circuit Judges.

The court having received a petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion rehearing en banc, the petition for rehearing has been referred to the original hearing

panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE
Court

Leonard Green

Leonard Green, Clerk

No. 91-5987

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
JUNE 24, 1992
Leonard Green Clerk

BEVERLY JOYCE WATKINS,

Plaintiff-Appellant,

v.

THE VETERANS ADMINISTRATION MEDICAL CENTER: KENNETH MULHOLLAND: DR. CARLO MAINARDI; DEPARTMENT OF VETERANS AFFAIRS; TOMMY DAVIS; PATRICIA HYATT; BEN JACKSON; ARTHUR NEVELS

Defendants-Appellees

Before: MERRITT, Chief Judge; Keith and Ryan, Circuit Judges.

Beverly Joyce Watkins, a pro se litigant appeals the dismissal of her 42 U.S.C. 1983 civil rights action. Because the defendants are federal officials, the correct basis for her suit is Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971). This case has been referred to

a panel of the court pursuant to Rule 9 (a) Rules of the Sixth Circuit. Upon examination of the briefs of the parties, record, and motion for oral argument, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Watkins sued the Department of Veterans Affairs, The United States of America, the Veterans Administration Hospital and six of ficials of the Veterans Administration. She stated that she was employed at the Veterans Administration Medical Center. She alleged that because of her union activities that the defendants conspired to have her fired by accusing her of sending her supervisor insulting, abusive, disrespectful, false and/or harrassing written material. Because of the charges brought against her and the fact that she was fired, her professional reputation was damaged.

The district court dismissed the action on the basis that Watkins failed to exhaust her administrative remedies and that any review of the Merit Systems Protection Boards's decision must be sought in the United States Court of Appeals for the Federal Circuit.

On appeal, Watkins argues that: because statutes do not permit an agency to pay monetary damages , there is no need for her to exhaust administrative remedies because the administrative remedy is inadequate and cannot provide the relief she requested; 2) exhaustion is not necessary because the agency and unambiguously violated statutory and constitutional rights; and 3) she was denied due process and equal protection.

Whether the district court dismissed a suit pursuant to Fed. R. Civ. P. (12)(b)(6) is a question of law subject to

de novo review. Meador v. Cabinet for Human Resources, 902 F. 2d. 474 (6th Cir.), cert. denied, 111 S. Ct. 182 (1990); Dana Corp v. Blue Cross & Blue Shield, 900 F. 2d. 882 (6th Circuit 1990).

As a federal employee, Watkins termination of employment is properly challenged with the Merit Systems Protection Board and not properly brought as a Bivens action in a United States District Court. See Jones v. TVA, 948 F. 2d 258, 264 (6th Cir. 1991); Saul v. United States, 928 F. 2d 829, 838-40 (9th Cir. 1991). Although she appealed her termination to the Merit Systems Protection Board, she failed to file a petition for review because she felt such petition would be futile. Review of the Board's decision on petitions for review is sought in the United States Court of Appeals for the Federal Circuit. See Berrios v. Depart-

ment of the Army, 884 F. 2d 28, 30 (1st. Cir. 1989). Watkins failed to exhaust her administrative remedies and filed suit in the district court. The district court simply lacked jurisdiction to hear the case.

Accordingly, it is ORDERED that the motion for oral argument be denied and the judgement of the district court be, and it hereby is, affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF

THE COURT

LEONARD GREEN
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FILED
July 25, 1991

BEVERLY JOYCE WATKINS

Plaintiff,

NO. 91-2031-TUA

VS.

THE UNITED STATES OF AMERICA, et al,
Defendants.

ORDER GRANTING MOTION TO DISMISS

The pro-se plaintiff alleges deprivation of her rights under both the United States Constitution and union agreements between the National Association of Government Employees and the Veterans Administration. ("VAMC") in Memphis, Tennessee. She alleges that because of her union activities the defendants participated in a conspiracy to have her fired. She also alleges that

in furtherance of this conspiracy defendants falsely accused her of having sent her supervisor "insulting, abusive, disrepectful, false and/or harrassing written material." According to the complaint, these charges have exposed plaintiff to contempt and ridicule and have harmed her ocupational reputation." She seeks punitve and compensatory damages in the amount of $1,000,000, injunctive relief (deletion of all inflammatory records and statements from (her) personnel files"), and attorney's fees.

Defendants contend, inter alia, that palintiff's failure to exhaust available administrative remedies entitles them to dismissal of her complaint. A federal employee against whom an adverse action such as removal has been taken may appeal to the Merit Systems Protection Board ("MSPB"). 5 U.S.C. 7513 (d). If an appeal is taken, an administrative

judge reviews the matter and issues an initial decision. If the administrative judge upholds the adverse action, the employee may then file a petition for review with MSPB. 5 C.F.R. 1201.114 (1991). The administrative judge's decision becomes final 35 days after it is issued unless a petition for review is filed or the case is reopened by the MSPB on its own motion. 5 C.F.R. 1201.113 (1991). The employee may obtain judicial review of a final decision by filing a petition for review of a final in the United States Court of Appeals for the Federal Cicuit. 5 U.SC. 7703. This petition must be filed "within 30 days after the date the petitioner received notice of the final order or decision of the Board." Id.

Plaintiff filed her complaint on January 8, 1991. On January 29, 1991, she

appealed her termination to the MSPB. This appeal resulted in an initial decision upholding the VAMC's action. Plaintiff has not filed a petition for review with the MSPB and maintains that it would be futile to do so. Relying upon the principle that exhaustion is not required when obviously futile, she contends that her claims are properly before this court.

Defendants' contention that the failure to exhaust available administrative remedies precludes judicial review of a federal employee's termination is correct. See Daly v. Costle, 661 F 2d 959 (D.C. Circuit 1981); McNabb v. Tennessee Valley 754 F. Supp. 118 (E.D. Tenn. 1990). However, it is not necessary to address the question of whether palintiff has exhausted her remedies because, even assuming that she has, this court is not the appropriate forum for resolution of her claims.

A federal employee who seeks judicial review of an adverse MSPB decision must do so in the Federal Circuit. Berrios v. Department of the Army, 884 F. 2d 28, 30 (1st Cir. 1989) (the Civil Service Reform Act preempts a federal employee's constitutional challenge to his removal) ; See also Solar v. Merit Systems Protection Board, 600 F. Supp. 535, 537 (S.D. Fla. 1984) (dicta) (even if plaintiff had exhausted available administrative remedies, the Federal Circuit is the proper forum for her claims.) It is true that plaintiff's complaint does not seek judicial review of an adverse MSPB decision; at the time the complaint was filed, plaintiff had not presented her claims to the Board. However, as discussed above, plaintiff cannot obtain judicial review without having first exhausted her ad-- ministrative remedies by bringing her

claims before the MSPB. Judicial review of the Board's decision must then be sought in the Federal Circuit.

Having concluded that this court is not the appropriate forum for judicial review of the plaintiff's claims, it is not necessary to address the other arguments raised in defendant's motion. For the foregoing reasons, the motion to dismiss is granted.

IT IS SO ORDERED this 25th day of July, 1991.

Jerome Turner

UNITED STATES DISTRICT JUDGE